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Mitchell v. State Appellant's Brief Dckt. 41882

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RYAN M. MITCHELL,

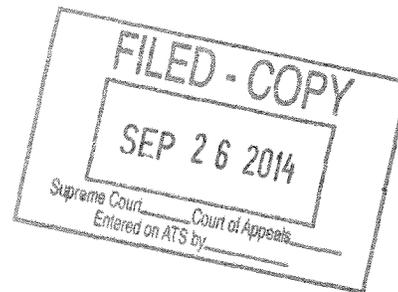
Plaintiff-Appellant,

vs.

GERALD DURK SIMPSON, an individual,
STATE OF IDAHO, a governmental entity and
BANNOCK COUNTY, IDAHO, a political
subdivision, SUSAN SIMPSON, as
Conservator and Guardian of Gerald Durk
Simpson, and DOES 1-25

Defendant-Respondent.

Supreme Court No. 41882
District Court No. CV-2012-4124-OC



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT.

HONORABLE ROBERT C. NAFTZ, DISTRICT JUDGE PRESIDING.

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Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, Honorable Robert C. Naftz, presiding.

I. STATEMENT OF THE CASE

A. Statement of the Case

This case presents a question of proper boundaries of the discretionary function immunity found in section 6-904(a) of the Idaho Tort Claims and, specifically, the extent to which the State can rely on “budget cuts” to immunize itself from actions that impact the health and safety of its citizens. This case also presents a question of whether the judiciary may enforce a victim’s rights guaranteed by Article I, Section 22 of the Idaho Constitution and codified in Section 19-5306, Idaho Code, or whether such rights are simply suggestions for state agencies to follow at their whim.

B. Statement of Facts

Gerald Durk Simpson, a diagnosed paranoid schizophrenic, had been receiving mental health services through the State of Idaho’s Department of Health and Welfare for most of his adult life. R. 169, 173, 177, 179. Among other things, the department’s services to Simpson, who lived by himself, included ensuring that he took the medications required to control his schizophrenia and helping perform simple activities of daily living, such as grocery shopping. R. 182. For reasons not yet fully explained, in 2009 department officials saw Simpson walking through town with a gun and found the event significant enough that they took and posted pictures in the local office. R. 183, 190, 191, 179.

In August of 2010, Simpson received a letter from the State telling him he no longer qualified for services he had been receiving for most of his adult life because the program was designed for only short term treatment. R. 102. There is no evidence that Simpson or his family was advised, prior to receiving this termination letter, that he would no longer be receiving the

mental health services that he had relied on most of his adult life. *See generally, Record.* Less than two months later, on September 27, 2010, Simpson walked out of the front door of his home and shot at Ryan Mitchell (R. 111), who was starting his motorcycle at the coffee shop across the street. One of the bullets pierced Mitchell through his back, breaking several ribs, puncturing his lung, and barely missing his heart. R. 12. Simpson walked back into his home, cleaned, reloaded, and stored his gun, and went about his business. R. 31. The following day, local law enforcement arrested Simpson for the shooting. R. 32. Approximately ten days later, on behalf of the State Department of Health and Welfare, psychologist Daniel Traugher, Ph.D. prepared a memorandum explaining the processes and procedures that were used in implementing the budget cuts so that patient mental health services would be terminated in a way that reduced the risk of harm to patients and/or the community (the “Traugher Memorandum”). R. 100. There is no evidence that anyone at the State followed the processes and procedures outlined in the Traugher Memorandum with respect to terminating Simpson’s mental health services. *See generally, Record.*

On September 30, 2010, the Bannock County Prosecuting Attorney’s Office filed a charge of Aggravated Battery against Simpson (I.C. §§ 18-903(a), 18-907(1)(a) & (b)) with notice that the State would seek an enhancement penalty for the use of a deadly weapon in the commission of a crime (I.C. § 18-2520):

That the said GERALD DURK SIMPSON, in the County of Bannock, State of Idaho, on or about the 27th day of September, 2010, did willfully and unlawfully use force or violence upon the person of another, Ryan Mitchell, by either the use of a deadly weapon or instrument and/or causing great bodily harm or permanent disability or permanent disfigurement by shooting Ryan Mitchell in the back.

R. 194, 195. Even though the Aggravated Battery charge was still pending against Simpson, the State of Idaho initiated a plan for the purpose of obtaining the release of Simpson. R. 37-38.

Specifically, on May 3, 2012, the State, through the State Attorney General's Office, filed a Petition on behalf of Simpson¹ to have a Conservator/Guardian appointed for Simpson so that he could be released from State custody. R. 168-171.

The State never notified Mitchell (i) that it had initiated the action in the District Court for Bingham County on behalf of Simpson, (ii) that it was representing Simpson in the District Court for Bingham County, (iii) that the proceeding in the District Court for Bingham County could result in the release of Simpson from State custody or (iv) that the proceeding in the District Court for Bingham County could result in the dismissal of the criminal charges against Simpson. R. 183-184, 204, 214-215. It is believed that Simpson was released from the State of Idaho's custody on or around August 20, 2012. R. 39. The criminal charges against Simpson in Bannock County were dismissed on August 30, 2012. R. 38. Shortly after learning that Simpson had been released from custody and would not be prosecuted for shooting and nearly killing him, Mitchell filed this lawsuit. R. 10.

C. The Proceedings Below

This matter comes to this court on appeal of an order granting summary judgment against Plaintiff Ryan Mitchell and in favor of the State of Idaho dismissing Counts I, II, and V of Mitchell's Complaint. Counts I and II of Mitchell's complaint seek declaratory and injunctive relief against the State for the State's violations of Mitchell's rights under Idaho's constitutional and statutory victim's rights provisions; in particular, for failure to notify Mitchell of its decisions to allow charges against Simpson to be dropped and for arranging for Simpson to be released from custody. Count V of Mitchell's Complaint seeks money damages from the State for its negligent or reckless acts related to the manner in which the State terminated Simpson's mental health services. Simpson, by and through his sister as his court appointed guardian,

¹ *In re Simpson*, Idaho State District Court for Bingham County, No. CV-2012-0862

allowed Mitchell to take default judgment against him for damages in excess of \$500,000.00. Bannock County has settled with Mitchell. Mitchell's claims against Simpson and Bannock County are not involved in this appeal.

II. ISSUES PRESENTED ON APPEAL

- A. Under section 9-604(a) of the Idaho Tort Claims Act, does discretionary function immunity shield operational decision makers from liability for negligently or recklessly failing to follow policies and procedures that were developed in response to budget cuts.
- B. Under Article I, Section 22 of the Idaho Constitution and/or Idaho Code Section 19-5306 does a private individual have the right to use the judicial process to seek recognition and enforcement of his victims' rights when they have otherwise been ignored by the State.

III. ARGUMENT

A. **The District Court Erred When it Classified the Decision to Terminate Simpson's Mental Health Services as a Discretionary Function, Barring any Tort Claim.**

The district court erred in holding that discretionary function immunity barred Mitchell's tort claims against the State because the district court incorrectly attributed the decision to terminate Simpson's mental health services to broad based policy decisions made in response to budget cuts. The evidence presented by the State in support of its motion for summary judgment demonstrates that the decision to terminate Simpson's mental health services was an operational level decision that was not made in accordance with the State's policies and procedures. Additionally, the evidence the district court relied on to grant discretionary function immunity was inadmissible. For either or both of these reasons, the district court should have denied the State's motion for summary judgment.

- i. **The district court failed to identify the precise nature of the conduct about which Mitchell complained before it reached the conclusion that the State's decision was entitled to discretionary function immunity.**

The most significant error made by the district court in its holding that discretionary function immunity barred Mitchell's claims against the State was the conclusion that budget cuts immunized all actions relating to termination of individual patients' mental health services

without first identifying whether the decisions or actions were planning or operational. In order to properly apply discretionary function immunity, the court must determine if the precise conduct about which the plaintiff complains is planning or operational. *Sterling v. Bloom*, 111 Idaho 211, 230, 723 P.2d 755, 774 (1986). The planning/operations distinction, which was developed by the United States Supreme Court and adopted by this Court, makes clear that the only activities properly classified as discretionary functions for purposes of 6-904(a) are those “activities which involve[] the establishment of plans, specifications and schedules where there is room for policy judgment and decision.” *Id.* at 229-230, 723 P.2d at 773-74. Once policies or procedures are set, the actions and decisions involved in implementing and carrying out those policies or procedures are properly classified as operational functions. *Jones v. City of St. Maries*, 111 Idaho 733, 736, 727 P.2d 1161, 1164 (1986). Importantly, for purposes of applying discretionary function immunity, the “exercise of discretion” does not involve any decision that involves judgment or choice:

... virtually all human endeavors, even the driving of a nail, involve *some* type of discretion as commonly defined. Clearly, then, “discretionary function” does not include functions which involve *any* element of choice, judgment or ability to make responsible decisions; otherwise every function would fall within the exception.

Sterling, 111 Idaho at 227, 723 P.2d at 771 (citations omitted) (emphasis in original). That is to say, discretionary function immunity applies only when it involves planning decisions, not when it involves operational decisions. If the matter complained of is an operational function, as is the case here, the State is not immune for failure to exercise due or ordinary care. *Id.* at 230, 723 P.2d at 774.

Because discretionary function immunity turns on the planning/operational distinction described at length in *Sterling v. Bloom*, the court must first precisely identify the complained of conduct so that it can determine if the conduct is a planning or operational function. In *Jones v.*

City of St. Maries, this Court provided examples highlighting the importance of precisely identifying the complained of conduct before attempting to apply discretionary function immunity. *Jones* involved complaints that the city negligently maintained fire hydrants, thereby causing a delay in fire-fighting efforts. 111 Idaho at 736, 727 P.2d at 1164. This Court noted that the plaintiffs' allegations of negligent maintenance were not enough to determine the precise nature of the complained of conduct and, accordingly, did not provide the Court with enough information upon which it could decide whether discretionary function immunity would apply. *Id.*

The *Jones* Court then explained that if the evidence showed that the City had made a broad policy decision, for budgetary or other reasons, not to inspect water mains and fire hydrants, then the complaints of negligent maintenance would relate to a discretionary function. *Id.* But, if the evidence showed that the City made a policy decision to assume a duty to inspect and the complaints of negligent maintenance related to the manner in which the City implemented its duty to inspect, then the complaints would relate to operational functions. *Id.* at 736-37, 727 P.2d at 1164-65.

The planning/operational test provides immunity for planning activities – activities which involve the establishment of plans, specifications and schedules where there is room for policy judgments and decision. Operational activities—activities involving the implementation of statutory and regulatory policy—are not immunized and, accordingly, must be performed with ordinary care.

Id. at 735-36, 727 P.2d at 1163-64. Accordingly, in order to apply discretionary function immunity properly, a court must first precisely identify the complained of conduct and then determine whether such complaints relate to the development of policies, processes or procedures (which conduct is properly classified as discretionary functions) or whether the

complaints relate to the implementation of those policies, processes or procedures (which conduct is properly classified as operational functions).

In this matter, the evidence presented to and relied upon by the district court shows that, in response to budget cuts, the State made a policy decision to reduce the number of patients receiving state services and, accordingly, developed processes and procedures for implementing the budget cuts by terminating some patients' services. R. 100, 105-106. However, with respect to terminating Simpson's mental health services, there is no evidence showing that the State followed the processes or procedures at all or otherwise exercised due care in implementing and/or carrying out those processes and procedures. *See generally, Record.* Accordingly, because the termination of Simpson's mental health services involved the intentional, reckless, and/or negligent failure to implement the policies and procedures, the termination of Simpson's mental health services was operational and the State is not entitled to discretionary function immunity.

Specifically, in support of its motion for summary judgment, the State claimed that the October 8, 2010, memorandum regarding the July 2010 Closure of ACT Team Clients, the Traughber Memorandum, outlined the process to be used at the operational level to terminate mental health services for certain patients.² R. 91. The Traughber Memorandum³ begins by making it clear that the processes and procedures were developed in an effort to "reduce the possibility of harm to clients and/or the community." R. 100. The Traughber Memorandum then describes the process:

² To be clear, this memorandum was prepared after Simpson's mental health services were terminated and after Mitchell was shot, apparently in an effort to justify actions that had already been taken. As such, it may be suspect, but it provides the only evidence before the district court affecting the question of discretionary function immunity.

³ Pursuant to Idaho R. Evid. 801(d)(2), because Traughber is an agent of the State and the contents of the Traughber Memorandum are statements concerning material within the scope of his agency relationship that were made during the existence of that agency relationship, the statements contained within the Traughber Memorandum are not hearsay when offered by Mitchell against the State. The State, however, is required to qualify those statements under an exception to the hearsay rule in order to use them in its affirmative case.

Specifically, the ACT Team, who at the time was being supervised by Daniel Traugher, closely examined the open clients. Each client was staffed on several occasions. In fact, most of the ACT Team client cases were staffed multiple times a week during the six weeks leading up to the closure. Of note, is that ACT Team clients who were ultimately closed had ability to pay for private services, access to services, and demonstrated a level of stability that indicated ACT Team level services were not necessary. Further, if an individual appeared to meet these criteria and yet a clinician, case manager, or the client themselves felt strongly that discontinuing ACT Team services would result in serious problems, they were removed from the possible closure list (which occurred in several cases).

R. 100. The broad policy decision to reduce the number of patients being served is similar to the hypothetical in *Jones* where the City—for budgetary or other reasons—elects not to inspect or maintain the fire hydrants. Accordingly, the decision to reduce the number of patients receiving mental health services is properly characterized as a discretionary function.

Critically, however, the court’s analysis does not and should not end there. Once policies, processes, and procedures are set, their implementation is an operational function. Stated differently, once the State makes a policy decision to assume a duty to terminate services in such a way as to “reduce the possibility of harm to clients and/or the community” (R. 100), it must carry out that duty in a non-negligent manner. *Jones*, 111 Idaho at 737, 727 P.2d at 1165 (“If, on the other hand, the evidence indicates that the city had, in fact, assumed the responsibility for inspecting and maintaining the fire hydrants and water mains at issue, then it would be obligated to perform those activities with due care and would be correspondingly liable for any failure to do so.”). In this case, the State made the policy decision to terminate patients’ services in a manner that reduced harm to the patients themselves and the community and developed a specific process to be followed to reduce the potential for harm. R. 100. The Traugher Memorandum outlined processes and procedures which state actors were to have followed, case-by-case, with respect to each patient. R. 100. Because the actual implementation of these

processes and procedures is an operational function, the State was required to use due care and act in accordance with the policies and procedures set forth in the Traugber Memorandum when processing each individual case, including Simpson's case.

The district court erred in granting summary judgment in favor of the State because it only conducted half of the analysis. In support of its decision to grant summary judgment, the district court paraphrased a portion of the *Jones* decision, stating:

The Idaho Supreme Court has specifically explained that if the evidence indicates that a policy decision was made 'due to budgetary constraints or other factors ... such a decision would be discretionary, as it would involve planning rather than operational activity, and the city would be immune from liability even if the decision was negligently made.' *Jones v. City of St. Maries*, 111 Idaho 733, 736-37, 727 P.2d 1161, 1164-65 (1986).

R. 483. But the district court failed to acknowledge and, therefore, otherwise ignored the very next sentence in *Jones* which reads:

If, on the other hand, the evidence indicates that the city had, in fact, assumed the responsibility for inspecting and maintaining the fire hydrants and water mains at issue, then it would be obligated to perform those activities with due care and would be correspondingly liable for any failure to do so.

Jones, 111 Idaho at 737, 727 P.2d at 1165. Accordingly, in reliance on that portion of *Jones* that states policy decisions made in response to budget cuts are discretionary and entitled to immunity, the district court then jumped immediately to the conclusion that any action that could be traced to budget cuts was entitled to discretionary function immunity. R. 483-84. In this partial analysis, the district court simply looked to the fact that the State, in response to budget cuts, had to modify its selection criteria for determining who received mental health services and then characterized every decision falling within the umbrella of that broad policy decision, ignoring the more specific question of whether the termination of Simpson's mental health

services was carried out in accordance with the policies and procedures outlined in the Traugher Memorandum.

The district court's conclusion that "budget cuts played a major role in the closure of Mr. Simpson's case file" ignored the second part of the analysis presented in *Jones*. As noted in *Jones*, if the State assumed a duty to close files and terminate services with some patients and not others, and to do so using processes and procedures designed to reduce the potential harm to patients and/or the community, and the evidence shows that the State did not follow its own processes for closing Simpson's file, then the State would be subject to tort liability. Because the district court failed to apply the planning/operational distinction, it improperly classified the decision to terminate Simpson's mental health services as a discretionary function and such decision should be overruled.

ii. There is insufficient evidence in the record to support a conclusion that the termination of Simpson's mental health services was made in accordance with the Traugher Memorandum.

The precise nature of Mitchell's complaints against the State is not that it was negligent in discretionary planning relating to budget cuts, but rather that it was negligent (perhaps grossly negligent, reckless, or intentionally ignored procedures) at the operational level when implementing those plans. Had the district court undertaken the proper analysis and looked precisely at whether the State followed its own processes and procedures when terminating Simpson's mental health services, it would have concluded that it had not acted with due care and in accordance with the Traugher processes and procedures. Rather, the State either altogether ignored its own processes and procedures or was negligent (or even grossly negligent) in the implementation of those processes and procedures.

With respect to the termination of Simpson's mental health services, there is no evidence in the record that the State used due care or even that it followed the processes and procedures

outlined in the Traughber Memorandum. Indeed, contrary to the processes and procedures outlined in the Traughber Memorandum, there is no evidence in the record of what, if anything, the ACT Team did to “closely examine” Simpson; there is no evidence that Simpson was “staffed on several occasions” or that Simpson was “staffed multiple times a week during the six weeks leading up to the closure;” there is no evidence that the ACT Team took into account Simpsons’ “ability to pay for private services”, Simpsons “access to services”, or whether Simpson “demonstrated a level of stability that indicated that ACT Team level services were not necessary.” *Cf.* R. 100 (Traughber Memorandum). Significantly, there is no evidence in the record that the ACT Team engaged with Simpson or his family members to gain an understanding of whether Simpson himself “felt strongly that discontinuing ACT Team services would result in serious problems.” *Cf.* R. 100 (Traughber Memorandum). In short, there is no evidence in the record that any of the procedures outlined in the Traughber Memorandum were ever followed with respect to Simpson.

Not only is there no evidence that the State used due care in implementing the processes and procedures outlined in the Traughber Memorandum, the evidence presented to and relied upon by the district court shows that—with respect to Simpson—the processes and procedures outlined in the Traughber Memorandum were completely disregarded. Rather than engaging in a case-by-case assessment outlined in the Traughber Memorandum, the evidence in the record shows that, with respect to Simpson, the State took a man with a diagnosis of paranoid schizophrenia (R. 169) for which the State had been providing mental health services to for most of his adult life (R. 177), a man who the State knew to be medically non-compliant (R. 182), a man who the State knew had access to guns (R. 183, 190, 191, 179), and to this man, the State sent a form letter telling him that the mental health services he had received for most of his adult

life were being terminated because the program was designed to serve people for only a short term and he no longer qualified (R. 102).

As the foregoing demonstrates, the district court's conclusion that the State was entitled to discretionary function immunity was erroneous because the district court failed to precisely identify whether the termination of Simpson's mental health services was the result of development of processes and procedures or the negligent implementation of those processes and procedures. The evidence detailed above demonstrates that the State did not follow its own processes and procedures when terminating Simpson's services and, indeed, appears to have misrepresented and/or failed to fully explain to Simpson why his services were being terminated and what, if anything he could do to prevent it from happening. Because there is no evidence that shows that the State even attempted to follow the processes and procedures outlined in the Traugher Memorandum, the State was, at a minimum, negligent in the manner in which it terminated Simpson's mental health services. To uphold the district court's decision—which focuses solely on the State's need to adjust to budget cuts—would be to immunize the State for any and every action that could somehow be connected to policy adjustments resulting from budget cuts; that is to say, to hold otherwise would be to immunize the State for any and every action.

Because the State did not exercise due care or even attempt to follow the Traugher processes and procedures when terminating Simpson's mental health services, Mitchell respectfully requests that this Court reverse that portion of the district courts order dismissing the tort claims found in Count V of his Complaint.

iii. The Court's conclusion that the decision to terminate Simpson's services was based on budget cuts is not supported by admissible evidence.

In support of its argument that the decision to terminate Simpson's mental health services was related to budget cuts and, therefore, entitled to discretionary function immunity, the State

submitted two affidavits made by persons who were not competent to testify to the matters contained in such affidavits. Although Mitchell has relied upon one of those affidavits for the purposes of the Traugher Memorandum discussed above, Appellant nonetheless argues, alternatively, that these affidavits were inadmissible for the purpose of the State's case and should not have been relied upon by the district court to support its decision. Because the district court relied upon such evidence when granting the State's motion for summary judgment on Mitchell's tort claims, there is an additional basis upon which this Court can reverse the district court's decision.

Neither of the affidavits submitted by the State in support of its motion for summary judgment met the standards set forth in Idaho Rule of Civil Procedure 56(e). On a motion for summary judgment, Rule 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). This Court has explained:

The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge. Only material contained in affidavits or depositions that is based upon personal knowledge or that is admissible at trial will be considered by this Court.

Smith v. Board of Corrections, 133 Idaho 519, 523, 988 P.2d 1193, 1197 (1999).

No consideration or weight should have been given to the Jodi Osborn Affidavit because it does not state that it is based upon her personal knowledge and, even if such personal knowledge is assumed, because it does not contain evidence admissible on other grounds. R. 107-108. Specifically, the affidavit does not indicate whether she was employed with the State at the time the facts set forth in her complaint occurred, nor does she describe how she became aware of the purported facts contained in her affidavit after she became employed. R. 107-08.

Finally, Osborn does not make any effort to connect her statement regarding fiscal 2009 and 2010 budget cuts with the manner in which the State terminated Simpson's mental health services. Because the Osborn Affidavit does not demonstrate that it would be admissible at trial, it was error for the district court to consider and rely on that affidavit as a basis to grant summary judgment.

The district court should also not have considered the Sue Chadwick Affidavit because it is an attempt to authenticate documents which cannot be properly authenticated by Chadwick. Chadwick, who identifies herself as office services supervisor for the State, purported to authenticate and introduce three documents that she did not author and which were, therefore, hearsay. R. 97. *See* Idaho R. Evid. 802. In order for these documents to be properly considered, the State was required to demonstrate that an exception to the hearsay rule applies. Idaho R. Evid. 802. The Chadwick Affidavit does not establish the foundation necessary to properly apply any exception to the hearsay rule.

Over Mitchell's objections, the district court erroneously found that the documents submitted under the Chadwick Affidavit were admissible under the business records exception to the hearsay rule. R. 472. The business records exception provides as follows:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Idaho R. Evid. 803(6). Contrary to the contents of the Chadwick Affidavit and the district court's conclusion, the business record exception is not a catch-all that allows admission of any

document that can be said to have been found in the files of a private or public “business.”

Rather, as this Court has noted,

The general requirements for the admission of business records are that the documents be ‘produced in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial.’ *Beco Corp. v. Roberts & Sons Constr. Co.*, 114 Idaho 704, 711, 760 P.2d 1120, 1127 (1988). These foundational requirements ‘supply the degree of trustworthiness necessary to justify an exception to the rule against hearsay.’ *Id.* It is necessary that the circumstances behind the creation of the business records ‘impl[y] a high degree of veracity.’ *Christensen v. Rice*, 114 Idaho 929, 934, 763 P.2d 302, 307 (Ct.App. 1988).

Hurtado v. Land O’Lakes, Inc., 147 Idaho 813, 815, 215 P.3d 533, 535 (2009).

The Chadwick Affidavit does not establish the foundational requirements for the business records exception. Chadwick states only that the three documents had been “maintained” by the State. R. 96-97. Chadwick does not claim that the documents were produced in the ordinary course of business; Chadwick does not claim that the documents were produced at or near the time of the occurrence; and Chadwick does not claim that the documents were not created in anticipation of trial. R. 96-97. The fact that a document may have been located or “maintained” in the State’s files does not, by itself, create an exception to the hearsay rule. Accordingly, it was improper for the district court to consider the contents and exhibits to the Chadwick Affidavit.

B. The District Court Erred When It Granted Summary Judgment on the Victim’s Rights Claims.

In granting summary judgment in favor of the State on counts I and II of Mitchell’s Complaint, the district court erroneously held that the victim’s rights guaranteed by the Idaho Constitution, Article I, Section 22 were not self-executing and, accordingly, no private enforcement mechanisms exist unless and until expressly granted by the legislature. The district court’s interpretation of Idaho’s Victim’s rights provisions ignores the plain language of Article I, Section 22 of the Idaho Constitution and the legislature’s codification of those rights in

Section 19-5306, Idaho Code, and misapplies traditional cannons of statutory construction, thereby rendering such rights meaningless.

This Court has made it clear that, where rights created by the constitution are self-executing, the legislature is not required to take any further action and courts may grant relief necessary to enforce the rights created by the constitution.

Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed.

Haile v. Foote, 90 Idaho 261, 267, 409 P.2d 409, 412 (1965) (citing *Cleary v. Kincaid*, 23 Idaho 789, 131 P. 1117 (1913)). Contrary to the district court’s analysis, this Court has held that “[t]he fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision from being self-executing.” *Id.* at 269, 409 P.2d at 413. And, indeed, if a statute is self-enacting, a court may grant relief necessary to enforce the rights and duties imposed. *See, id.* at 261, 409 P.2d at 409 (granting a preemptory writ of prohibition to enforce constitutional amendment regarding the election of sheriffs) and *Cleary v. Kincaid*, 23 Idaho 789, 131 P. 1117 (1913) (granting a writ of mandate to enforce constitutional amendment that made the county treasurer instead of the county assessor the tax collector).

In this case, the plain language of Article I, Section 22 of the Idaho Constitution clearly and expressly states that the provision is self-executing: “This provision shall be self-enacting.” Accordingly, no additional action by the legislature is required in order for courts of this state to grant relief necessary to protect the rights and enforce the duties established. Nevertheless, the Idaho Legislature enacted Idaho Code Section 19-5306 recognizing those rights and by use of the word “shall” in subsection (1), made it clear that the duty to protect victim’s rights was mandatory. *See Bonner County v. Cunningham*, 156 Idaho 291, ___, 323 P.3d 1252, 1258 (Ct.

App. 2014) (“In all cases since *Willys Jeep*, the Supreme Court has consistently held that the use of the term “shall” or “must” in a statute is mandatory”). Because the Idaho Constitution’s Victim’s Rights provisions are self-executing and because the Idaho legislature has made it clear that the duty to protect such rights is mandatory, the recognition and enforcement of such rights can be realized through declaratory or injunctive relief.

In concluding that the legislature was required to provide mechanisms for enforcement of the victim’s rights guaranteed by the Idaho Constitution, Article I, Section 22, the district court mistakenly relied upon a Nebraska case, - *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001), which examined language of the Nebraska Constitution that is fundamentally different than that found in Idaho’s Constitution. Specifically, the Nebraska provision mandated legislative action by stating that “[t]he Legislature shall provide by law for the implementation of the rights granted in this section.” *Lamm*, 620 NW.2d at 768. Because the Nebraska legislature had failed to pass any laws implementing the provision, the *Lamm* Court held there were no enforcement mechanisms available. Conversely, the Idaho Constitution empowers, but does not require, the Idaho legislature to enact further legislation in order to protect victim’s rights. Specifically, our constitution provides “This section shall be self-enacting” and, further, that “The legislature shall have the power to enact laws to defined, implement, preserve, and expand the rights guaranteed to victims in the provisions of this section.” Idaho Constitution, Article I, Section 22. And, indeed, the Idaho legislature did enact Section 19-5306 which makes it clear that there is a mandatory duty to protect victim’s rights guaranteed by the Idaho Constitution.

Mitchell’s position that declaratory and injunctive relief are available to enforce his constitutional and statutory rights is further supported by the fact that claims for money damages and attorney’s fees are expressly excluded. First, under the cannon of construction “expressio

unius est exclusio alterius,” the inclusion of certain enumerated items implies the exclusion of those things which are not specifically listed. *See, e.g., State v. Michael* 111 Idaho 930, 933, 729 P.2d 405, 408 (1986). The Constitutional provision and statute eliminate the legal remedies of “money damages” and “attorney’s fees” and that exclusion makes equitable relief in the form of an injunction against future violations even more appropriate. *See Thomas v. Campbell*, 107 Idaho 398, 404, 690 P.2d 333, 339 (1984) (“there is the established principle of law that equity will not afford relief to a plaintiff where there is an adequate remedy at law.”). Moreover, it has been previously recognized by this Court that the “[e]quity jurisdiction of the District Court is not confined to statutory provision for delineation and is not subject to diminution by legislative acts.” *Gerlach v. Schultz*, 72 Idaho 507, 512, 244 P.2d 1095, 1098 (1952). And, under Idaho’s declaratory rights act, Idaho Courts have broad powers “to declare rights, status and other legal relations, whether or not further relief is or could be claimed.” IDAHO CODE § 10-1201. That is, this Court can declare Mitchell’s “rights” under the Constitutional Crime Victim provision, and under the Crime Victim Statute, regardless of “whether or not further relief,” like money damages, is available. The fact that the legislature deemed it necessary to specifically exclude actions for money damages and attorney’s fees is an implicit recognition that the rights created under Idaho’s victims’ rights provisions can be otherwise enforced through private actions for declaratory and injunctive relief.

The district court mistakenly relied upon generalizations from an ALR Annotation that have no relevance to Mitchell’s claims for Declaratory Judgment or Injunctive relief—Jay M. Zitter, Annotation, Validity, Construction and Application of State Constitutional or Statutory Victim’s Bill of Rights, 91 A.L.R.5th 343. (2001). R. 477. However, cases referenced in the Annotation involved attempts by the crime victim to **intervene** in the criminal sentencing or

probationary proceedings. That did not occur here. Here, Mitchell seeks to enforce his rights through a separate action for declaratory and injunctive relief.

In Mitchell's complaint, neither the first nor the second causes of action seek money damages from the State. The first cause of action seeks a declaratory judgment. The second cause of action seeks an injunction, an equitable remedy. Both of these remedies should be available under the self-executing victims' rights provisions found in the Idaho Constitution as well as their statutory counterparts found in Idaho Code Section 19-5306. Because the district court erred in holding that Mitchell could not bring any action to enforce his rights under Idaho's constitutional and statutory victims' rights provisions, Mitchell respectfully requests that this Court reverse that portion of the district courts order granting summary judgment in favor of the State on Counts I and II.

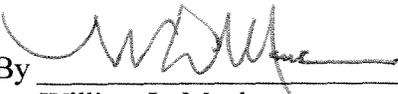
IV. CONCLUSION

For the forgoing reasons, Mitchell respectfully requests that this Court enter an order reversing the decision of the district court that granted summary judgment in favor of the State on Counts I, II, and V of Mitchell's Complaint.

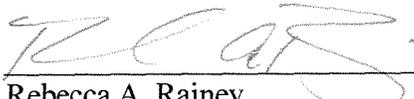
Dated this 20th day of September, 2014.

Respectfully Submitted,

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By 
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